SUPREME COURT U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

EHREDT UNDERGROUND, INC.,

PETITIONER,

v.

COMMONWEALTH EDISON COMPANY,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL UNION NO. 196,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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145 pp

QUESTIONS PRESENTED

1. Did the Seventh Circuit Court of Appeals impermissibly extend the holding in Atlantic Richfield Co. v. USA Petroleum, 495 U.S. 328, 110 S.Ct. 1884 (1990) and ignore this Court's holding in Blue Shield of Virginia v. McCready, 47 U.S. 465, 102 S.Ct. 2540 (1982) by denying standing to the victim of a group boycott?

2. Did the Seventh Circuit Court of Appeals err in holding, as a matter of law, that per se and "naked restraint" boycott principles have no application to vertical conspiracies?

3. Did the Seventh Circuit Court of Appeals misread Brown v. National Football League, 116 S.Ct. 2116 (1996) to overrule, sub silentio, both United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965) and Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S.Ct. 1830 (1975) rehearing denied 432 U.S. 884, 96 S.Ct. 156 and thereby shelter from antitrust liability a union/third party conspiracy to destroy marketplace competition?

4. Did the Seventh Circuit Court of Appeals err in concluding that the litmus test for labor exemption shelter from the antitrust laws is whether the conduct is violative of the National Labor Relations Act?

5. Did the Seventh Circuit Court of Appeals contravene the Seventh Amendment Right to Trial by Jury, by resolving conflicting evidence of economic theory and ignoring other material issues of disputed facts?

6. Did the Seventh Circuit Court of Appeals err by expanding the preemptive effect of the NLRA to matters neither arguably prohibited by nor protected by the Act in contravention of this Court's holdings in Belknap, Inc. v. Hale, 463 U.S. 491, 103 S.Ct. 3172 (1983) and International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923 (1958)?

7. Did the Seventh Circuit Court of Appeals err in dismissing, with prejudice, some common law claims for relief while declining to exercise supplemental jurisdiction on the balance of such claims?

PARTIES

All of the parties to this proceeding are named in the caption. The petitioner, Ehredt Underground, Inc. (Ehredt) was the plaintiff in the District Court and appellant in the Court of Appeals. The plaintiff is a corporation, but has no affiliates. IBEW Local 196 (Local 196) is an unincorporated labor organization and is affiliated with the International Brotherhood of Electrical Workers, AFL-CIO and with various locals of the International (International). Commonwealth Edison Company (Edison) is a publicly held corporation. Its affiliates are not known to petitioner.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

Petitioner respectfully prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Seventh Circuit (Circuit Court).

DECISIONS BELOW

The Circuit Court's decision is published at 90 F.3d 238 (7th Cir. 1996), reproduced in the Appendix at pp. 1 - 8. The appeal to that court was taken from three District Court opinions and the resulting judgment. Two of the opinions are published at 830 F.Supp. 1083 (N.D. Ill. 1993), Appendix pp. 9 - 35; and 848 F.Supp. 797 (N.D. Ill. 1994), Appendix pp. 38 - 73. The third unpublished opinion appears at Appendix pp. 76 - 84.

JURISDICTION OF THIS COURT

The Circuit Court rendered its Decision on July 23, 1996. This Court has jurisdiction to review by certiorari the decision of the Circuit Court pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The constitutional and statutory provisions involved are: the Seventh Amendment to the Constitution, Appendix p. 89; Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157-8, Appendix pp. 94 - 105; Section 1 of the Sherman Act, 15 U.S.C. § 1, Appendix p. 89; Section 4 of the Clayton Act, 15 U.S.C. § 15, Appendix pp. 90 - 92; and 28 U.S.C. § 1367, Appendix pp. 92 - 94.

STATEMENT OF THE CASE

Factual Statement

Ehredt sought relief under Section 1 of the Sherman Act against all defendants; for common law interference by Local 196 in the agreement and prospective advantage between Edison and Ehredt; and for breach by Edison of the contract between Edison and Ehredt.

The case comes before this Court in the wake of an affirmed grant of summary judgment and of a 12(b)(6) motion.

The facts and inferences are summarized in a fashion favorable to Ehredt.

Edison is the sole provider of electrical services to residential users in Northern Illinois. Connection of residential utility services is performed by underground trenching and installation of related equipment (URD).

Edison entered into an agreement with Illinois Bell allocating geographic territories within which each would perform URD services for the other. Employees of Illinois Bell, represented by IBEW Local 336, performed the work allocated to them under the agreement. Until 1988 members of a different IBEW local performed these services directly for Edison.

In 1988 Edison elected to subcontract these services to third parties. The bid specifications dictated the labor relations to qualify, i.e. each must be signatory to a labor contract with "some union".

Ehredt qualified to perform this work. It executed a Prehire Agreement with IBEW Local 336. The terms and conditions of this Agreement were favorable to Ehredt and were approved by the International.

Ehredt and others, including Trench-It, were awarded work in districts of the Edison Northern Division. Subsequently Edison awarded its 1990 Crystal Lake District contract to the low bidder, Ehredt.

Previously, Trench-It learned of Ehredt's financially favorable labor contract. Given the economic differences, it did two things. First, it shored up its Edison relations by hiring Edison relatives; and second, it complained vociferously to its Union, Local 196, about its sister union's agreement with Ehredt. These complaints were unsuccessful.

However, the drum beat of voiced complaint and demand for action by Trench-it and its multi-employer association escalated with loss of the 1990 bid. The cudgel was taken up again by Local 196. After political infighting,

Local 336 was ousted from its representative capacity by its International, leaving Ehredt employees without representation and Ehredt nonunion. Continuation of this status violated the Edison/Ehredt "some union" agreement.

Edison required only slight prompting from Local 196 to cinch the noose. Bonds had been forged between Trench-it and Edison, through Trench-it hiring relatives of Edison and through "paying the piper".

Mistakenly Ehredt disclosed its bid strategy for the 1990 contract to Edison. Trench-It's bid came in just below the disclosed bid plan of Ehredt. Edison, forecasting that Trench-It would win the contest and hire away Ehredt employees, was frustrated when Ehredt dropped its price and won the bid. In retaliation, Edison promised to keep a close eye on Ehredt and to award the contract to Trench-it for any "wrong moves".

When Ehredt failed to make any wrong moves, Edison diverted work to Trench-It. Ehredt's refusal to play ball with Edison by paying "the piper" harmed it.

The coup de grace, loss of its relationship with Local 336, was announced in August. Ehredt sought a prehire replacement agreement with two other unions. Each would replicate the wage and fringe structure of Local 336. Edison, after review of confidential, internal union documents, vetoed affiliation with either union. This consigned Ehredt to a Hobson's choice, i.e. either lose the construction contract because it was non-union or embrace Local 196, and its ruinous labor contract.

Local 196 had a multi-employer agreement. That agreement's favored nations clause foreclosed third party employers from negotiating a more favorable arrangement. Privy to the immutable effect of this a clause, Ehredt was inveighed by Local 196 to execute the multi-employer agreement upon assurance it would obtain an equitable

adjustment to the Edison contract. Such an adjustment was essential, as the escalated labor cost would otherwise be ruinous. Armed with assurances from the Union and overtures of interest in renegotiation from Edison, Ehredt executed the Area Agreement. Once this was done, Edison stonewalled renegotiation of the agreement. Ehredt was forced to relinquish its contract with Edison. Delighted at this turn of events, Edison awarded Trench-It the agreement. Freed of its competitor, Trench-It billed and Edison paid at two and three times the contract rate for non-existent rock, etc. These costs are and were passed on to the consumer within the Edison monopolist enclave.

BASIS FOR FEDERAL JURISDICTION

The United States District Court had jurisdiction pursuant to 15 U.S.C. §15 and 28 U.S.C. §§1331 and 1337 and had supplemental jurisdiction pursuant to 28 U.S.C. §1367.

ARGUMENT

1. Summary Of Reasons For Granting Certiorari.

As will be explicated in further detail, there are substantial reasons for granting this petition. They include a conflict among the Circuits whether to characterize a vertical conspiracy to boycott under the rule of reason, "naked restraint" or per se tests; the extent to which Atlantic Richfield Co. v USA Petroleum Co., 495 U.S. 328, 110 S.Ct. 1884 (1990) displaces the private attorney general in the enforcement of the antitrust laws and, sub silentio, overrules Blue Shield of Virginia v McCready, 457 U.S. 465, 102 S.Ct. 2540 (1982); whether conduct not violative of the National Labor Relations Act is, ipso facto, sheltered from Sherman Act scrutiny; the extent to which a court may permissibly invade the traditional province of the jury to declare economic principles to be strictly issues of law; whether the lower court has ignored the fundamentals of preemption, as explained by this Court in Belknap, Inc. v. Hale, 463 U.S. 491, 103 S.Ct. 3172 (1983)

and International Ass'n. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923 (1958); whether the lower court misinterpreted this Court's decision in Brown v. National Football League, 116 S.Ct. 2116 (1996) and assumed this Court overruled Connell Const. Co. Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616; 95 S.Ct. 1830 (1975); rehearing denied 423 U.S. 884, 96 S.Ct. 156 (1975) and United Mine Workers of America v Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965); and finally, whether proper administration of 28 U.S.C. §1367 requires a bright line rule.

2. Conflict Among The Circuits And The Continuing Vitality Of Klor's, Inc. Re Group Boycotts.

The District Court held that the facts demonstrated merely a vertical boycott between Edison and Trench-It; that the rule of reason applied; and that petitioner had failed to demonstrate injury to competition under such rule. The Circuit Court adopted this analysis.

The seminal case is, of course, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959) where a minuscule retailer suffered a boycott at the hands of a direct competitor and its suppliers. While the complaint alleged a horizontal boycott, the holding governed a series of rimless wheel vertical conspiracies between Broadway Hale and each of its suppliers.

Eschewing the approach dictated by this Court in Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099 (1972), the Circuit Court set upon a course of judicial activism to reshape the contours of traditional antitrust dogma. The result will proliferate uncertainty within the business community by substituting the rule of reason for bright line litmus test resolution of boycott lawfulness. The lawfulness of conduct can no longer be judged by a snap shot or label but rather the retrospective analysis of disagreeing economists.

The language of the Sherman Act, if read literally, would interdict all restraints upon trade. It was softened,

judicially, to foreclose "unreasonable" restraints, Standard Oil Co. of New Jersey v. U. S., 221 U.S. 1, 31 S.Ct. 502 (1911), a proxy to the common law.[1] This decision set the Court upon an unacceptable ad hoc course of case-by-case analysis. This led to establishment of the per se test. As this Court explained:

> "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries,in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken."[2]

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[1]The common law adopted the ancillary restraint doctrine to aid in ferreting out unreasonable conduct. Actual detrimental effects did not have to be demonstrated where the sole object of the conduct was restraint of a competitor. The actual reasonableness of the restraint was adjudicated only where the restraint was ancillary to some beneficial purpose.

[2]Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5, 78 S.Ct. 514 (1958).

In Discon, Inc. v. NYNEX Corp., 93 F.3d 1055 (2nd Cir. 1996) the Second Circuit Court of Appeals held that the per se rule applies to vertical boycotts where the purpose is stifling merely one competitor.[3] This Court has not held, since Klor's, whether either the per se or "naked restraints test"[4] will continue to govern vertical boycotts which are unaided by any pro-competitive aspect.[5] [6]

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[3]Cited in support of this conclusion, in addition to Klor's, was Com-Tel, Inc. v. Dukane Corp., 669 F.2d 404 (6th Cir. 1982); and Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366 (9th Cir. 1983). Cited in opposition is Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752 (11th Cir. 1983).

[4]F.T.C. V. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009 (1986).

[5]Ehredt contended that Edison was, in fact, an actual or potential competitor in the market for provision of URP because it directly engaged in that activity in some areas and further because, under its agreement with Illinois Bell, sold or traded such services commercially. In contravention of dicta within Discon it rejected this invitation.

[6]Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5, 78 S.Ct. 514 (1958).

While danger always accompanies distilling immutable guiding principles from precedent, it does appear that there must be a confluence of two factors to satisfy a court that the per se rule ought to be applied. First, there should be a cumulative series of decisions decrying the specific restraint. This permits the court to discontinue weighing the purpose and effect of the practice. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959), Joseph E. Seagrams & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969) cert. denied 396 U.S. 1062, 90 S.Ct. 752 (1970).

Second, evolving out of the court's experience with prior cases is the inference that the sole or primary intent motivating the conduct is achievement of an anti-competitive effect. Where the defendant demonstrates that its primary purpose or its effect is promotive of competition, the per se label is not attached. This confluence of factors is present here. Cf. United States v. Hilton Hotels Corp., 467 F.2d 1000

(9th Cir. 1972) cert. denied 409 U.S. 1125, 93 S.Ct. 938 (1973).

Further, this Court has also adopted a short hand rule of reason test. This appears to be akin to "main" versus "ancillary" dichotomy of the common law. Section One of the Sherman Act does not act merely as a bulwark against mature, entrenched monopolists. It also seizes upon incipient behavior, seeking its early arrest. Thus proof of violation does not demand a gnat's eyebrow analysis of market power. A truncated approach suffices to interdict "naked restraints" on price or output. Where the challenged conduct effects price or output responsiveness to demand, no detailed market analysis is necessary. National Collegiate Athletic Ass'n. v. Univ of Oklahoma, 468 U.S. 85, 104 S.Ct. 2948, 2964-65 (1984).

The Circuit Court rejected application of both the per se test and the truncated "naked restraints" test. It ignored the fact that, as in Klor's v. Broadway Hale, a conspiracy existed to drive a cost efficient, consumer benefiting, force from the

market place. In doing so, it widened the gap among the fractured Circuit Courts upon application of the per se test; alternately it did violence to this Court's admonition in Indiana Federation and NCCA.

3. Arco Expanded And McCready Ignored.

The Circuit Court held that petitioner failed to prove it had suffered antitrust injury.[7] In reaching this conclusion, it impermissibly expanded this Court's holding in Atlantic Richfield Co. v. USA Petroleum Co., 459 U.S. 328, 110 S.Ct. 1884 (1990) and ignored the impact of Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540 (1982).

In Arco, this Court distinguished between violation of the Sherman Act and standing to obtain damage relief under Section 4 of the Clayton Act. Ibid. 1889. A plaintiff must establish the traditional elements of standing plus antitrust

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[7]Amazingly, the court reached this decision even though it was not raised as a defense by the respondents in their brief or argument to the court.

injury, i.e. injury attributable to an anti-competitive aspect of the challenged conduct or practice.[8]

Congress relied upon "private attorney generals" to supplement the scarce resources of the Justice Department in the enforcement of the Sherman Act. To promote such, this Court has acknowledged the broad remedial purposes of the Act and favored its liberal construction in favor of putative victims. Reiter v. Sonotone Corp., 442 U.S. 330, 337, 99 S.Ct. 2326 (1979). The error of the Circuit Court was to ignore the remedial policy of the Act; the facts of these Supreme Court decisions; and fail to apply the lesson of McCready, supra.

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[8]Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S.Ct. 484 (1986), Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697 (1977) cert. denied 429 U.S. 1090, 97 S.Ct. 1099 (1977). See also Sharp v. United Airlines Inc., 967 F.2d 404, 406-407 (10th Cir. 1992) cert. denied 506 U.S. 974, 113 S.Ct. 464, contra Adams v. Pan American World Airways, Inc., 828 F.2d 24 (D.C. Cir 1987) cert. denied 485 U.S. 934, 108 S.Ct. 1109 (1988) and cert. denied 485 U.S. 961, 108 S.Ct. 1225 (1988).

In Brunswick, the causally relevant harm to the plaintiff was the advent of vigorous competition; in Arco, a price fixing arrangement between third parties did not cause competitive injury to the plaintiff because the resulting price, absent predation, could benefit plaintiff and not harm the consumer; in Cargill plaintiff ruminated about the prospect of vigorous, non-predatory future price competition. None of these cases addressed the harm to the direct victim of a boycott.

In McCready the Court granted relief to an indirect victim of a conspiracy to boycott others. The Court acknowledged that the direct victim of a boycott is within the penumbra of the Clayton Act. The court further stated that the relationship between the claimed injury and that which made defendant's conduct unlawful is not the sin qua non to recovery, but merely a factor. Fn. 20, Ibid. 2550. The rule of McCready applies.

4. Seventh Amendment Transgressed.

The VII Amendment grants the right to trial by jury. Care must be exercised to avoid, in the zeal to dismiss complex antitrust cases, trampling upon this right. A court ought not to be converted "into a thirteenth juror who must be persuaded before an antitrust violation may be found."[9]

The Circuit Court violated these principles in two ways: First, it weighed its own views of economic fact and theory against the evidence introduced by Ehredt. Second, it rejected reasonable inferences of complicity by Local 196 in the boycott.

While petitioner primarily asserted that application of the per se or naked restraint rule trumped the need to establish injury to competition, it did not rest on this assertion. It also introduced substantial expert testimony, defining the relevant market and harm to the consumer. Neither defendant

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[9]In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 438-39 (9th Cir. 1990), cert. denied 500 U.S. 959, 111 S. Ct. 2274 (1991).

introduced any contrary expert evidence. The Court, applying its Chicago School brand of economic theory, gave no weight or credence to the contrary opinion evidence.

This approach, an apparent but unfortunate progeny of Matsushita[10], fairly raises the question of when and in what circumstances, faced with a FRCP 56 motion, a court may ignore expert opinion evidence.

The normative answer to this issue, consistent with the VII Amendment, must be limited to those circumstances where, as a matter of law, this evidence would make no difference in the outcome.

Secondly, there was the issue of whether Local 196 was a party to the conspiracy. The trial court said no, in categorical disagreement with the Magistrate.[11] This decision

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[10]Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986).

[11]"In light of that motive, the record gives rise to an unmistakable inference that these three entities combined their efforts to achieve that end." (Appendix to Seventh Circuit p. 226).

squarely conflicts with Fineman v. Armstrong World Industries, Inc., 980 F.2d 171 (3d Cir. 1992) cert. denied, 507 U.S. 921, 113 S.Ct. 1285 (1993) and Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 143, n. 64 (3rd Cir. 1978). A conspiracy may be shown between vertically aligned parties, even when their motive differs, providing the purpose is known and material aid in its accomplishment is afforded. Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996 (3rd Cir. 1994) cert. denied 115 S.Ct. 1691 (1995).

5. Revisionist Interpretation Of The Implied Labor Immunity.

In a remarkable tour de force, the Circuit Court held Brown v. National Football League determines the existence of an antitrust violation, not merely the scope of the labor exemption.[12]

The Circuit Court analysis is constructed upon flawed assumptions. First it equates compliance with the NLRA with

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[12]No party briefed or raised the issue of the exemption upon appeal.

a lack of antitrust exposure; second it assumes a concession that favored nations clauses and third party agreements are lawful; and third that Brown overrules Connell and Pennington.

The Ninth Circuit, aided by this Court's decisions in Connell and Pennington defuses the first assumption. In Sun-Land Nurseries, Inc. v. Southern California Dist. Council of Laborers, 793 F.2d 1110 (9th Cir. 1986) cert. denied 479 U.S. 1090, 107 S.Ct. 1299 (1987) the court held that a clause, lawful under the NLRA, did not lead to automatic exemption from antitrust liability.

The Circuit Court's second assumption is equally flawed. Petitioner contended that Edison violated the antitrust laws when, acting as a principal for its own work and as agent for Illinois Bell, it insisted upon and reached agreement with Ehredt that it would become party to a particular union's area agreement. Cordova v. Bache & Co., 321 F.Supp. 600, 606 (S.D. N.Y. 1970).

Finally, the Circuit Court's implicit assumption that Connell, supra, was overruled, suggests scrutiny by this Court. Facially Brown does not overrule Connell, indeed it extolled its logic. The narrow holding of Brown does not implicate Connell, i.e. that employer members of a multi-employer bargaining unit may collectively implement the terms of their last best offer upon their respective, represented employees. Nor does it deal with strangers to their bargaining unit, as both Connell and Pennington did. Employers may not use the union as their catspaw to eliminate competition in the marketplace by imposition of ruinous terms and conditions of employment.

In Connell a union picketed contractors to compel the contractors to subcontract work solely to subcontractor's signatory to the area labor contract. The court held the exemption did not apply because it restrained the business market in ways that would not follow naturally from elimination of competition over wages, hours and working conditions. The conduct involved here is not exempt because

what Local 196 did, in combination with Trench-It, i.e., rid itself of Local 336, was not a restraint naturally flowing from the elimination of competition over wages, hours and working conditions. This is the heart of Connell. This is where Connell differs.[13]

6. Preemption And The Conflict With Belknap, Inc. And Gonzalez.

The Circuit Court's affirmance of the District Court's preemption analysis creates a conflict with this Court's prior decisions in Belknap and Gonzales.

Ehredt was the target of concerted activities between Local 196 and its International, initiated by Trench-It, to deprive it of the fruits of its agreement with Edison. The wrongful motive was to destroy Ehredt's ability to perform its fixed cost contract with Edison. The means used were twofold: First, to cause the International to divest Local 336

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[13]See also Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 65 S.Ct. 1533 (1945), reh'g denied 326 U.S. 803, 66 S.Ct. 11 (1945).

of jurisdiction, and order it to disclaim representation of Ehredt employees. Second, to misrepresent to Ehredt it would cause Edison to amend the construction agreement to account for spiraled labor cost.

State courts are preempted from considering matters that are arguably prohibited or protected under the NLRA. San Diego Building Trades Council v. Garmon, 358 U.S. 801, 79 S.Ct. 20 (1958). Even when this predicate exists preemption will not apply if (a) the activity regulated is merely of peripheral concern under the Act; (b) the conduct touches deeply rooted local concerns; (c) there is a lack of identity of issues which could be presented to the NLRB, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197, 98 S.Ct. 1745 (1978); or (d) there is a lack of appropriate remedy.

Gonzales makes clear that the NLRA does not deal with intra-union matters. Such matters therefore may be resolved by state law. Local 196's argument that Local 100 of United

Ass'n. of Journeymen and Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423 (1963), reh'g. denied 375 U.S. 872, 84 S.Ct. 28 (1963) overruled Gonzales is wrong. Borden sought the use of state law to remedy his discriminatory referral from the union hiring hall. The Supreme Court held this allegation was of a type, even though internal, within the purview of the NLRB because it involved wages, hours and working conditions. The Borden court distinguishes Gonzales on the basis that it did not directly involve the employer/employee relation. 373 U.S. 690, 637. Here, as in Gonzales, the dispute was wholly intraunion, making the conduct not preempted. Teamsters Locals 70 and 85, 136 N.L.R.B. 1086, 49 L.R.R.M. 1930 (1962).

The lower court labored to ferret out a theory upon which the NLRB could fashion relief. It proclaimed an arguable violation of Section (8)(b)(4)(C). This section applies solely to coerced ouster of a "certified union". Local 336 was not certified. Loss of jurisdiction was strictly an intra-union

political maneuver. The (8)(b)(4)(C) rationale is wholly inapplicable. Sheet Metal Workers Intern. Ass'n. AFL-CIO v. N.L.R.B., 293 F.2d 141 (D.C. Cir. 1961), cert. denied 368 U.S. 896, 82 S.Ct. 172 (1961).

Nor is the second wrongful means of interference, false representation of its ability to cause Edison to amend the construction contract, preempted. Yes, a very attenuated argument could be made that fraudulent statement in negotiations is subject to NLRA scrutiny. However, as in Belknap such conduct is peripheral to the Act and of sufficient local concern to implicate federalism policies underscoring preemption.

7. Scope Of Supplemental Jurisdiction.

Ehredt alleged common law tort and contract claims for relief. The tort count was dismissed, under FRCP 12(b)(6), for failure to state a claim for relief. A portion of the Contract Count, breach of a covenant of good faith and fair dealing, was dismissed under FRCP 56, with the express breach remitted to

trial. On the eve of trial the court dismissed the federal predicate claim and then declined to exercise supplemental jurisdiction over the remnant contract claim.

The effect of this decision was to bifurcate a single claim for relief arising out of a common nucleus of facts, remitting petitioner to appeal of the dismissed claims to the Circuit Court and to the state court on the contract claim. The impact of this determination is to tax the resources of two court systems, let alone the precious resources of the parties.

The posture of this case calls for a bright line rule to be observed by all district courts. That rule would be: If a federal court declines to exercise supplemental jurisdiction, it must either vacate any predecessor dispositive ruling on state law claims; or retain and exercise jurisdiction to avoid piecemeal, separate court litigation over the same nucleus of facts.

CONCLUSION

It is respectfully submitted that this Court should grant a Writ of Certiorari to resolve the substantial issues raised by this petition.

Respectfully submitted,

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